appeal being considered either by a judge or the Court of Appeal.

The rule does not provide for the Court of Appeal considering the merits of the application of a party who was not a pauper in the Court below and as I have pointed out above the merits were in fact considered by Horne J. upon the application before him. The rules have accordingly been complied with, and there is no substance in this objection.

This disposes of all the preliminary objections. In my opinion the application should be granted and the applicant should have six weeks from the date of the order made herein to file her notice of appeal. The respondents should have their costs to be taxed as between solicitor and client and paid out of the estate. There will be no order as to the applicant's costs.

**THOMAS C.J. (F.M.S.)**—I concur.

**HOWES J.**—I concur.

*Application Allowed.*

Solicitors for trustees—*Rodyk & Davidson.*

Solicitor for applicant—*P. Battishill.*

Solicitors for 1st respondent—*Donaldson & Burkinshaw.*

Solicitors for 3rd, 4th and 5th respondents—*Drew & Napier.*

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[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J.

July 27, 1937.

## BRITISH MALAYA TRUSTEE AND EXECUTOR COMPANY, LIMITED AND ANOTHER

vs.

## CHAN MEK TUAN AND TWO OTHERS.

[SINGAPORE ORIGINATING SUMMONS No. 56 of 1937]

*Will — Construction — "Child" — Whether adopted sons included — Duties of Counsel who appear for a representative of a class.*

An illustration of a testator making his own dictionary. The expression "child" may be interpreted to include "adopted sons" if it appears from the will that the testator has used the expression in that sense.

When counsel appears on behalf of a person appointed to represent a class of persons it is his duty to protect the interests of that class. If the representative himself gives his counsel instructions which are inconsistent with that duty, counsel should either refuse to accept such instructions and should protect the interests of the class or else he should retire from the case.

ADJOURNED ORIGINATING SUMMONS.

*Page* for plaintiffs, the trustees.

*Cobbett* for first defendant.

*Zehnder* for second defendant.

*Green* for third defendant.

The facts and arguments appear sufficiently from the judgment.

*Cur. Ad. Vult.*

**TERRELL, AG.C.J.**—Three questions arise upon this Originating Summons:

(1) Whether the expression "child" in clause 2 of the Will means a natural child or includes an adopted child

(2) Whether under clause 6(3) of the Will the gift to Lim Chye Inn of 20 out of 95 shares of the income of the residuary Trust Funds vested in the said Lim Chye Inn absolutely or was subject to defeasance upon her death after the Testator, but before the date of distribution

and (3) Whether a sum of $19,162.96 in the hands of the Plaintiffs as receivers be treated as capital or income.

As regards the first question, this presents little difficulty. The testator had only one natural child, his daughter Lim Chye Inn. His three sons were all adopted. As however he speaks of his adopted sons as 'sons' throughout the Will, and as the expression 'last surviving child' in clause 2 necessarily implies that the testator considered he had more than one child, I think it follows that the expression 'child' includes his adopted sons.

As regards the third question, there is no evidence as to the origin of the $19,162.96, which the receivers found in the Bank after their appointment. There have clearly been large defalcations of capital, and, on the authority of *In re Grabowski's Settlement*, L.R. 6 Eq. p.12, the sum in question must be treated as capital. If any of the legatees have any claim for arrears of income such claim must be preferred against the defaulting trustees; *Solley* v. *Wood*, 54 English Reports, p.714.

The chief difficulty arises upon the construction of clause 6 of the Will. Clause 6 contains a bequest of all the residue to the Trustees, upon trust for sale, conversion and investment, and for payment of debts, funeral and testamentary expenses and upon trust:—

> "To stand possessed of the moneys and investments for the time being representing my residuary estate which moneys and investments are herein called "my residuary trust funds" until the date of distribution IN TRUST in the meantime to pay out of the income thereof the said monthly sums of Dollars eight hundred

($800) and such repairs or renewals as may be necessary to my house No. 56—5, Neil Road aforesaid and to divide the balance of the income thereof into ninety five (95) equal shares and pay the same to the legatees following (hereinafter called "my residuary legatees") or in the event of the death of any one or more of such legatees to the next of kin of such legatee or legatees so dead in accordance with the statutes of distribution and in the event of the death of any one or more of such next of kin as aforesaid then to the next of kin of such next of kin in accordance with the statutes of distribution and only in the event of the complete failure of the *stirps* of any one or more of my residuary legatees shall the shares of such original residuary legatee or legatees fall into residue. The following are my residuary legatees and the shares to which they are respectively entitled:—

(1) To my wife CHAN MEK TUAN (in Chinese) ten shares,
(2) To my son the said LIM GEOK CHIP (in Chinese) fifteen shares.
(3) To my daughter the said LIM CHYE INN (in Chinese) twenty shares."

It will be seen that the words used are "or in the vent of the death of any one or more such legatees."

The usual rule of construction is that if there is an immediate gift to A, and a gift over "in case of his death" or any similar expression implying that the death is a contingent event, the gift over will only take effect in the event of A's death before the testator.

If this rule of construction is strictly applied, Lim Chve Inn having survived the testator, the share of income would be payable to her or her estate until the period of distribution. There can be little doubt that if this construction is adopted it will clearly defeat the intention of the testator, as in clause 6 he seems to have contemplated the income being paid successively to the next of kin of deceased legatees and to next of kin of deceased next of kin, so long as the income continued to be payable.

Now "the cardinal rule or principle to be kept in view is of course that effect shall be given to the expressed intention of the testator" [*per* Lord Shand in *Hickling* v. *Fair*, (1899) A.C. p.15 at p.27] and there have been a few cases in which other indications in the will have enabled the Courts to depart from the strict rule of construction mentioned above. (See *Jarman* on Wills 7th edition, p.2081 and the cases there mentioned). In none of these cases however are the provisions at all similar to the provisions of the will now before the Court, and it is unnecessary therefore to refer to these decisions in detail.

There is however a further rule that where the gift is of a life interest only, then the contingency of death has been treated as meaning 'after the death' at any time before the interest vests in possession, and in this connection the learned author of Jarman states at p.2086:

> "Where the prior gift, though not expressly for life, comprises the annual income only of the fund which is the subject of the bequest, the same construction seems to prevail as where the gift is expressly for life."

The authority for this proposition is stated to be *Tilson* v. *Jones*, 1 Russ. & Mylne p.553. It is doubtful if this case is really an authority for the proposition stated by Mr. Jarman, as the gift to the original legatees was of interest only and the gift over of principal and interest, and this fact assisted the Master of the Rolls to find that the gift over should take effect. I think however that where the legacy is of income only until a period of distribution, and there are substantial bequests of such income "in the event of the death of the legatees" it is easier to infer that a life interest only was intended, as the testator has not disposed of the capital of the fund, and it is more likely that he intended the gift over to take effect, rather than that the benefit should continue to be payable to a deceased legatee's estate.

I think however that the matter is put beyond all doubt by clause 8 of the Will which reads as follows:—

> "I DIRECT that my Trustees shall stand possessed of the residuary trust funds at the date of distribution IN TRUST FOR such of my residuary legatees as shall be living at the date of distribution and for the next of kin of such of my residuary legatees and their descendants *per stirpes as shall have died prior to the date of distribution* in the shares or proportions which the residuary legatees or their respective next of kin were under the provisions in that behalf hereinbefore contained entitled to the income of my residuary trust funds immediately before such date."

From this clause it is quite clear that the testator contemplated that certain persons would be in enjoyment of the income under clause 6, and that these same persons would be entitled to the corpus at the date of distribution in the same proportions as they were entitled to the income immediately before the date of distribution.

In clause 8 the testator speaks of the "residuary legatees and the next of kin of such residuary legatees (and their descendants *per stirpes*) as shall have died *prior to the date of* distribution." Accordingly in clause 8 he clearly

contemplates successive interests in the income. If, however the strict rule is applied to clause 6 there will be no successive interests, and the estates of deceased legatees would be enjoying the income until the date of distribution. But under clause 8 a different set of persons would be entitled to the corpus. The result therefore would be opposed to the clear intention expressed in clause 8, that the beneficiaries entitled to the corpus must be the *same* persons who were enjoying the income immediately before distribution.

I find accordingly that on the construction of clause 6 the expression 'in the event of the death' means 'at the death' at any time before the period of distribution.

In interpreting the meaning of "next of kin" husbands and wives of beneficiaries must be excluded.

As regards prayer 10 of the Originating Summons I direct that the applicants commence actions against the former Trustees in respect of their alleged defalcations.

There is one other matter to which I would refer. On construction summonses such as the present, the Court is careful to see that all conflicting interests are represented. On the second issue defined above, it was to the interest of the executrix of Lim Chye Inn to argue that the gift of income to Lim Chye Inn under clause 6(3) of the Will was absolute. On the other hand, it was to the interest of the children of Lim Chye Inn, some of whom were infants, to argue that the gift over took effect. The infants were not originally before the Court, but when the Originating Summons came before the Acting Chief Justice on the 30th April, 1937, he directed that the 2nd defendant Lim Ah Kow, the eldest son of Lim Chye Inn, should represent his infant brothers and sisters. These interests were separately represented by counsel whose duty it was to support their respective clients' cases to the best of their ability. When however the case came on for hearing and the argument in favour of an absolute gift had been submitted to the Court, counsel for the infants informed the Court that he accepted these submissions, and offered no argument on his client's behalf.

It may be that Lim Ah Kow, the 2nd defendant, would receive a larger interest if the Court decided in favour of the absolute gift, and expressly instructed his solicitor not to press the claims of the infants whom he was supposed to represent. If that was the case counsel's duty was perfectly clear—either he should refuse to accept such instructions, and protect the interest of the infants, or else he should retire from the case. The counsel in question appears not to have realised his duty in the matter, such duty being to put forward any arguments which might be advanced in opposition to the claim that the interest was absolute. It was not part of his duties to decide whether such arguments were or were not likely to succeed—that being entirely a matter for the Court, still less was it his duty to abandon the claim of his infant clients for any other reason. I do not say that there may not be cases in which the presentation of an argument *contra* may not be purely formal, there being in substance nothing to argue, but on the second question referred to above, the decision of the Court has actually been in favour of the proposition which learned counsel was either unable or unwilling to support, even on behalf of his infant clients. It may well be that the decision of the Court does not commend itself to the counsel concerned, it may not even be correct, but it can hardly be maintained that there was nothing whatever to be said in its favour.

I am confident that the great majority of the advocates and solicitors of this Court are fully cognisant of the principles enunciated above, and that for them my observations are superfluous. I have thought it right however to go into the matter in some detail because in the present case these principles have been disregarded.

With regard to costs most of the hearing was occupied with the second question referred to above upon which the 2nd defendant and his counsel neglected their duty to the infants whom they represented, and gave the Court no assistance whatever. The order therefore will be that the costs of all parties be taxed as between solicitor and client and paid out of the estate, but the 2nd defendant will only be entitled to recover one third of the getting up fees. and of the hearing fees on the 13th July and the 21st July.

*Order accordingly.*

Solicitors for trustees—*Allen & Gledhill.*

Solicitors for first defendant—

*Rodyk & Davidson.*

Solicitors for 2nd defendant—

*Zehnder Bros.*

Solicitors for 3rd defendant—

*John G. Campbell & Co.*